RECORD, CASE No. 15,123.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1892.

TERM No., 1153.

B. A. SHUNK, PLAINTIFF IN ERROR,

vs.

THE MOLINE, MILBURN AND STODDART COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

INDEX.

	Original.	Print.
Caption	1	1
Petition	1	1
Order for attachment	13	9
Affidavit for attachment, &c.	14	9
Summons	23	16
Marshal's return	24	16
Demurrer to petition	25	17
Motion to discharge attachment	25½	17
Order overruling motion to discharge attachment	25½	17
Judgment	28	20
Petition for writ of error	28	20
Writ of error	30	21
Citation	31	21
Bond	32	22
Clerk's certificate	34	23

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., NOVEMBER 19, 1892.

1 Pleas before the Honorable Elmer S. Dundy, judge of the district court of the United States for the district of Nebraska, sitting in the circuit court of the United States for said district of Nebraska, within the eighth judicial circuit, at the term of May, A. D. 1892.

Be it remembered that on the 14th day of November, 1891, a petition was filed in the office of the clerk of said circuit court; which said petition is in words and figures following, to wit:

In the Circuit Court of the United States for the District of Nebraska.

MOLINE, MILBURN & STODDARD CO., Plaintiff,
vs.
B. A. SCHUNK, Defendant. } Petition.

1. And now comes The Moline, Milburn & Stoddard Co., plaintiff, and represents unto the court that it is a corporation organized and existing under and by virtue of the laws of the State of Ohio, and said plaintiff is a citizen of the State of Ohio.

2. That the amount of the matter in dispute exceeds $2,000.00, exclusive of interest and costs, in value; that the defendant is a resident and citizen of the State of Nebraska, and was such resident and citizen during all of the times hereinafter mentioned, and said defendant was transacting a mercantile business in said State when, and where the indebtedness hereinafter mentioned was contracted and created, and now the plaintiff presents unto the court here its causes of action as follows:

1st. For that on the 9th day of March, 1891, at the town of Blue Hill, said defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

2 $24.50. BLUE HILL, NEBR., 3, 9, 1891.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, twenty-four and $\frac{50}{100}$ dollars, with exchange and collection charges, value received. with interest at the rate of ten per cent. per annum from due until paid, at First National bank, in Blue Hill, Nebraska.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17593.

2nd. And for that on the 9th day of March, 1891, at the town of Blue Hill, said defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$243.48. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred forty-three and $\frac{48}{100}$ dollars, with exchange and collection charges, value received, with interest at the rate of ten per cent. per annum from due until paid at the First National Bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17594.

3rd. *That for* on the 8th day of October, 1890, at the *term* of Blue Hill, said defendant made and delivered to the plaintiff a promisory note, of which the following is a copy:

3 $44.60. BLUE HILL, NEB., *Oct. 8th*, 1890.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, forty-four and $\frac{60}{100}$ dollars, with exchange and collection charges, value received, with interest at the rate of ten per cent. per annum from maturity until paid, at the First National Bank of Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 16653.

4th. For that on the 24th day of January, 1891, at the town of Blue Hill, said defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$268.94. BLUE HILL, NEB., *Jan.* 24, 1891.

On the 1st day of Oct., 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred sixty-eight and $\frac{94}{100}$ dollars, with exchange and collection charges, value received, with interest at the rate of ten per cent. per annum from date until paid, at Blue Hill, Nebr.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 16954.

Endorsed: Blue Hill, Nebr., Oct. 3rd, 1891. Protested for non-payment. C. D. Robinson. Notarial seal. C. D. Robinson, notary public.

Paid Sept. 30, '91	$17 18
" Oct. 27, '91	29 70
" Nov. 2, '91	4 15
" " 11, '91	30 40

5th. For that on the 4th day of September, 1891, at the town of Blue Hill, said defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

Dealers, Neb. Form. BLUE HILL, *Sep.*, 1891.

On the 8th day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, thirty and $\frac{00}{100}$ dollars ($30.00), with exchange and collection charges, value received, with interest at the rate of ten per cent. per annum from due until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 20760.

That there is now due and payable on said notes $530.09, together with 10 % —, as above stated.

The plaintiff further represents unto the court that each and all of the foregoing promissory notes are past due and wholly unpaid, save and except the amounts above specified as having been paid on the promissory note mentioned in paragraph four.

Plaintiff further represents unto the court that at the time when said notes became due and payable the same were presented to the defendant by the plaintiff and payment thereof demanded at the place specified in said promissory notes and that payment was refused by the defendant.

5 6th. For a further cause of action against the defendant the plaintiff represents unto the court that on Sept. 28th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

BLUE HILL, NEBRASKA, *Sept.* 28, 1891.

On the first day of Dec., 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, fourteen and $\frac{50}{100}$ dollars ($14.50), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1st, 1891, until paid, at Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs or collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co., No. 21037.

The plaintiff further represents unto the court that said note will become due and payable on the 1st day of December, 1891.

7th. For a further cause of action against the defendant the plaintiff represents unto the court that on January 24th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$268 92. BLUE HILL, NEB., *Jan.* 24, 1891.

On the first day of Dec., 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred and sixty-eight and $\frac{92}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from date until paid, at Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, in-
6 cluding plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 16956.

The plaintiff further represents unto the court that said note will become due and payable on the first day of December, 1891.

8th. For further cause of action against the defendant the plaintiff represents unto the court that on March 9th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$24.50. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, twenty-four and $\frac{50}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at the First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17596.

The plaintiff further represents unto the court that said note will become due and payable on the first day of December, 1891.

9th. For a further cause of action against the defendant the plaintiff represents unto the court that on March 9th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$243.48. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order
7 of Moline, Milburn & Stoddard Co., incorporated, two hundred forty-three and $\frac{48}{100}$ dollars, with exchange and collec-

tion charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co., No. 17595.

The plaintiff further represents unto the court that said note will become due and payable on the first day of December, 1891.

10th. For a further cause of action against the defendant the plaintiff represent unto the court that on Sept. 4th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

BLUE HILL, NEB., *Sept. 4th*, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred fifty-eight & $\frac{43}{100}$ dollars ($258.43), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from 10, 1, '91, until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & — Co.'s, No. 20761.

The plaintiff further represents unto the court that said
8 note will become due and payable on the 1st day of December, 1891.

11th. For a further cause of action against the defendant the plaintiff represents unto the court that on M'ch 9th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$243.49. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Jan'y, 1892, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred and forty-three and $\frac{49}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17597.

The plaintiff further represents unto the court that said note will become due and payable on the first day of January, 1892.

12th. For a further cause of action against the defendant the plaintiff represents unto the court that on September 4th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

BLUE HILL, NEB., *Sep.* 4, 1891.

On the 1st day of Jan'y, 1892, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, one hundred eighty-two and $\frac{44}{100}$ dollars ($182.44), with exchange and collection
9 charges, value received, with interest, at the rate of ten per cent. per annum, from 10, 1, '91, until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 20762.

The plaintiff further represents unto the court that said note will become due and payable on the 1st day of January, 1892.

13th. For a further cause of action against the defendant the plaintiff represents unto the court that on Sept. 28th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

BLUE HILL, NEB., *Sept. 28th*, 1891.

On the first day of January, 1892, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred ninety-five and $\frac{63}{100}$ dollars ($295.63), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 21038.

The plaintiff further represents unto the court that said note will become due and payable on the first day of January, 1892.

14th. For a further cause of action against the defendant the plaintiff represents unto the court that on November 10th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

10 $37.00, No. —. BLUE HILL, NEBRASKA, *Nov. 10th*, 1891.

On or before the first day of January, 1892, for value received, I, or we, the undersigned, promise to pay to Moline, Milburn & Stoddard Co. or order thirty-seven & no $\frac{}{100}$ dollars, at Blue Hill,

Nebraska, with interest from due until paid, at the rate of ten per cent. per annum. For the purpose of obtaining credit I, or we, hereby certify that I own in my name and fee simple — acres of land in S. —, T. —, R. —, county of ——, State of Nebraska, with — acres improved, worth $——, which is not incumbered by mortgage or otherwise, except $——. I own $—— worth of personal property over and above all indebtedness and exemptions. For value received, I or we, the undersigned, do hereby sell and mortgage unto the payee hereof one ——.

(Signed) B. A. SCHUNK.

M., M. & S. Co., # 21674.

The plaintiff further represents unto the court that said note will become due and payable on the first day of Jan'y, 1892.

15th. For a further cause of action against the defendant the plaintiff represents unto the court that on November 10th, 1891, the defendant made and delivered to the plaintiff a promissory note, of which the following is a copy:

$95.65, No. —. BLUE HILL, NEBRASKA, *Nov. 10th*, 1891.

On or before the 5th day of Febr'y, 1892, for value received, I, or we, the undersigned, promise to pay to Moline, Milburn & Stoddard Co. or order ninety-five & $\frac{65}{100}$ dollars, at Blue Hill, Nebraska, with interest from due until paid, at the rate of ten per cent. per annum. For the purpose of obtaining credit I, or we, hereby certify that I own in my name and fee simple — acres of land in S. —, T. —, R. —, county of ——, State of Nebraska, with — acres improved, worth $——, which is not incumbered bymortgage 11 or *or* otherwise, except $——. I own $—— worth of personal property over and above all indebtedness and exemptions. For value received I, or we, the undersigned, do hereby sell and mortgage unto the payee hereof one ——.

(Signed) B. A. SCHUNK.

M., M. & S. Co., # 21675.

The plaintiff further represents unto the court that said note will become due and payable on the 5th day of February, 1892.

The plaintiff further represents unto the court that no part of the last above-described promissory notes have been paid, and that the will be due thereon from the defendant to the plaintiff the sum of sixteen hundred sixty-four & $\frac{4}{100}$ dollars, with interest at the rate of 10 % from the respective times specified in said promissory notes as hereinbefore alleged.

16th. Plaintiff further represents unto the court that said defendant has sold, conveyed, and otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors or to hinder or delay them in the collection of their debts; that he is about to make such further sale, assignment, conveyance, or disposition of his property with such fraudulent intent.

Plaintiff further represents to the court on or about the tenth day of November, 1891, the defendant, with the intent of cheating, wronging, and defrauding his creditors, transferred, assigned, and set over unto the First National Bank of Blue Hill insurance policies upon which a total loss had occurred to the amount of five thusand dollars; that said First National bank already held a mortgage upon the property of said defendant of the worth and value of about four thousand dollars; that the indebtedness of said First National bank held from this defendant at said time did not exceed the worth and value of four thousand dollars.

12 Affiant further says that at the time of assignment of said policies of insurance the said First National bank held security for its debt in the sum of eighteen hundred dollars, evidenced by collateral notes payable to this defendant and by him transferred, assigned, and delivered to said First National bank.

That at said time said bank took the policies above mentioned and took a mortgage upon the chattels of said defendant in addition to the collateral security it then held for its said debt.

Plaintiff further represents unto the court that on or about the fifth day of November, 1891, said defendant was indebted to the State Bank of Blue Hill, Neb., in about the sum of nineteen hundred dollars; that said bank holds a chattel mortgage of said date on about two thousand dollars' worth of personal property belonging to this defendant; that at said time said defendant assigned, transferred, and delivered to said State Bank of Blue Hill a policy of insurance for the sum of two thousand dollars upon which a total loss had prior to said time occurred; that said bank holds in addition to said chattel mortgage and insurance policy collateral notes of the defendant to the value of between three and four hundred dollars.

The plaintiff further alleges the fact to be that no part of said debt has been paid, save and except as hereinbefore stated in this petition; that there is now due thereon from defendant to this plaintiff the sum of $530.09, with interest thereon at 10 % from the dates specified in said notes; that the sum of $1,664.04 will become due and payable from said defendant to this plaintiff on the 1st and 8th days of December, 1891, as shown by the copies of said note forming a part of this petition.

Wherefore the plaintiff prays judgment against the said defendant for the said sum of $530.09, with interest thereon from the respective dates of the notes which are now past due, together with

13 the further sum of $1,664.04, which will become due and payable the 1st and 8th days of December, 1891, with interest thereon from the respective dates of said promissory notes, and the plaintiff prays that it recover a judgment for all of its costs paid out and expended in this action, and plaintiff further prays for a judgment against said defendant for all reasonable costs of collection of the above-mentioned indebtedness, and for a judgment including plaintiff's attorneys' fees in the sum of $250.00.

MOLINE, MILBURN & STODDARD CO.,
By CAPPS & STEAVENS, *Its Att'ys.*

UNITED STATES OF AMERICA,
State of Nebraska, Douglas County, } ss:

I, Charles F. Calkins, do solemnly swear that I am an agent of the plaintiff in the above-entitled action; that the facts stated in the foregoing petition are within my own personal knowledge, and the same are true, as I verily believe; that the plaintiff in this action is a corporation, citizens of the State of Ohio, and that the foregoing petition is passed upon written instruments for the payment of money, and such instruments are now in my possession.

CHAS. F. CALKINS.

Subscribed in my presence and sworn to before me this 14th day of November, 1891.

[SEAL.] JOHN H. BEXTER,
Notary Public.

Upon the back of said petition appear endorsements in words and figures following, to wit:

14 Nov., 1891. Authority is given to issue an attachment in this cause for the amount claimed in the petition, as well for the claims not yet due as for the other sums sued for, and also a sufficient sum to secure the probable costs of same, not exceeding the amount provided by law. (S'g'd) Elmer S. Dundy, judge.

14

No. 3960. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Petition filed Nov. 14, 1891. Elmer D. Frank, clerk. Capps & Stevens, for pl'ff.

Thereupon, afterwards, to wit, on the said 14th day of November, 1891, affidavit for attachment and against garnishees and for claims before due was filed in said case; which said affidavit is in words and figures following, to wit:

Affidavit for Attachment.

In the Circuit Court of the United States for the District of Nebraska.

MOLINE, MILBURN & STODDARD CO., Plaintiff,
vs.
B. A. SCHUNK, Defendant.

UNITED STATES OF AMERICA,
State of Nebraska, Douglas County, } ss:

Charles F. Calkins, agent of the plaintiff, deposes and says that the plaintiff has commenced an action against B. A. Schunk in the circuit court of the United States for the district of Nebraska to recover the sum of $2,194.13 *dollars,* now due and to become due and payable to the plaintiff from the defendant, upon the following promissory notes, to wit:

$24.50. BLUE HILL, NEBR., 3, 9, 1891.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, twenty-four and $\frac{50}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from due until paid, at First National bank, in Blue Hill, Nebraska.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co., # 17593.

$243.48. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred forty-three and $\frac{48}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from due until paid, at the First National bank, in Blue Hill, Nebr.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17594.

$44.60. BLUE HILL, NEB., *Oct. 8th*, 1890.

On the 1st day of Oct., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, forty-four and $\frac{60}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from maturity until paid, at the First National bank of Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s No. 16653.

$268.94. BLUE HILL, NEB., *Jan.* 24, 1891.

On the 1st day of Oct., 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred sixty-eight and $\frac{94}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from date until paid, at Blue Hill, Nebr.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 16954.

Endorsed: Blue Hill, Nebr., Oct. 3rd, 1891. Protested for non-payment. C. D. Robinson, notary public. C. D. Robinson, notarial seal, Webster county, Nebraska.

Paid Sept. 30, '91, $17.18.
" Oct. 27, '91, 29.70.
" Nov. 2, '91, 4.15.
" Nov. 11, '91, 30.40.

BLUE HILL, NEB., *Sept.* 4, 1891.

On the 8th day of October, 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, thirty and no $\frac{}{100}$ dollars ($30.00), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from due until paid, at ——

Should this note not be paid until due the maker and endorsers agree to pay all reasonable costs of collection of same, including plaintiff's attorney fees.

(Signed) B. A. SCHINK.

M., M. & S. Co.'s, No. 20760.

BLUE HILL, NEBR., *Sept.* 28, 1891.

On the first day of December, 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, fourteen and $\frac{50}{100}$ dollars ($14.50), with exchange and collectio n charges, value received, with interest, at the rate of ten per cent. per annum, from October 1st, 1891, until paid, at Blue Hill, Neb.

17 Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co., No. 21037.

$268.92. BLUE HILL, NEB., *Jan.* 24, 1891.

On the first day of Dec., 1891, — promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred and sixty-eight and $\frac{92}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from date until paid, at Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s No. 16956.

$24.50. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, twenty-four and $\frac{50}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at the First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same,
18 including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17596.

$243.48. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred forty-three and $\frac{48}{100}$ —, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from October 1, '91, until paid, at First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17595.

BLUE HILL, NEB., *Sept. 4th*, 1891.

On the 1st day of Dec., 1891, I promise to pay to the order of Moline, Milburn & Stoddard Co, incorporated, two hundred fifty-eight and $\frac{43}{100}$ dollars ($258.43), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from 10, 1, '91, until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & C. Co.'s, No. 20761.

$243.49. BLUE HILL, NEB., 3, 9, 1891.

On the 1st day of Jan'y, 1892, I promise to pay to the order
19 of Moline, Milburn & Stoddard Co., incorporated, two hundred and forty-three and $\frac{49}{100}$ dollars, with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at First National bank, in Blue Hill, Neb.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney's fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 17597.

BLUE HILL, NEB., *Sep.* 4, 1891.

On the 1st day of Jan'y, 1892, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, one hundred eighty-two and $\frac{44}{100}$ dollars ($182.44), with exchange and collection charges, value received, with interest, at the rate of ten per cent. per annum, from 10, 1, '91, until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

(Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 20762.

BLUE HILL, NEB., *Sept. 28th*, 1891.

On the first day of January, 1892, I promise to pay to the order of Moline, Milburn & Stoddard Co., incorporated, two hundred and ninety-five and $\frac{63}{100}$ dollars ($295.63), with exchange and collection charges, value received, with interest at the rate of ten per cent. per annum, from Oct. 1, '91, until paid, at ——.

Should this note not be paid when due the maker and endorsers agree to pay all reasonable costs of collection of the same, including plaintiff's attorney fees.

20 (Signed) B. A. SCHUNK.

M., M. & S. Co.'s, No. 21038

$37.00. No. —. BLUE HILL, NEBRASKA, *Nov.* 10*th*, 1891.

On or before the first day of Jan'y, 1892, for value received, I, or we, the undersigned, promise to pay to Moline, Milburn & Stoddard Co. or order thirty-seven and no $\frac{00}{100}$ dollars at Blue Hill, Nebraska, with interest from due until paid at the rate of ten per cent. per annum. For the purpose of obtaining credit I, or we, hereby certify that I own in my name and fee simple — acres of land in S. —, T. —. R, —, county of ——, State of Nebraska, with — acres improved, worth $——, which is not incumbered by mortgage or otherwise, except $——. I own $—— worth of personal property over and above all indebtedness and exemptions. For value received I, or we, the undersigned, do hereby sell and mortgage unto the payee hereof one ——.

(Signed) B. A. SCHUNK.

M., M. & S. Co's, No. 21674.

$95.65. No. —. BLUE HILL, NEBRASKA, *Nov.* 10*th*, 1891.

On or before the 5th day of Feb'y, 1892, for value received, I, or we, the undersigned, promise to pay to the Moline, Milburn & Stoddard Co. or order ninety-five & $\frac{65}{100}$ dollars at Blue Hill, Nebraska, with interest from due until paid at the rate of ten per cent. per annum. For the purpose of obtaining credit I, or we, hereby certify that I own in my name and fee simple — acret of land in S. —,

T. —, R. —, county of ——, State of Nebraska, with — acres improved, worth $ —— , which is not incumbered by mortgage or otherwise, except $——. I own $—— worth of personal property over and above all indebtedness and exemptions.

For value received I or we, the undersigned, do hereby sell and mortgage unto the payee hereof one —— .

(Signed) B. A. SCHUNK.

M., M. & S. Co., # 21675.

21 The affiant further says that said claim is just, and that the plaintiff ought, as affiant believes, to recover thereon the sum of $2,194.13 *dollars* and interest.

Affiant further says that the defendant is about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors; that the defendant has property or rights in action which he conceals. Affiant further says that defendant has assigned, removed, or disposed of or is about to dispose of his property or a part thereof with the intent to defraud his creditors.

Affiant further says that on or about the tenth day of November, 1891, the defendant was the owner and in possession of insurance policies issued by the following companies, to wit:

Niagara Insurance Co., $2,000.00.

Northern Assurance Co. of London, $2,000.00.

Farmers' & Merchants' of Lincoln, Neb., $2,000.00.

German Insurance of Freeport, Ill., $1,000.00.

That prior to said time loss had occurred by fire which destroyed the principal part of the property covered by said insurance policies; that at said time said defendant, without any consideration whatever, transferred, assigned, and set over unto A. G. Koehler five thousand dollars of said policies of insurance, to wit:

Farmers' & Merchants' of Lincoln, $2,000.00.

Niagara Insurance, 2,000.00.

German Insurance of Freeport, Ill., 1,000.00.

That at the time of execution and assignment of said policies said Koehler held a chattel mortgage upon the property of this defendant—upon $4,500.00 worth of property; that said chattel mortgage was in full force and effect; that said Koehler also held promissory notes, collateral, in the sum of eighteen hundred dollars.

Affiant further represents unto the court that the genuine indebtedness of this defendant to said Koehler at that time did not exceed four thousand dollars. Affiant further says that after the assignment of said insurance policies to said Koehler, as above mentioned, said B. A. Schunk, by proper order in writing of that time purporting to be dated November eleventh, gave to Parlin, Orendorff & Martin and McCormick Harvesting Machine Co. all his surplus collateral in the hands of said H. G. Koehler for the securement of the indebtedness held by said Parlin, Orendorff & Martin and said McCormick Harvesting Machine Co. against said B. A. Schunk.

22 Affiant further says that at said time said B. A. Schunk

assigned, transferred, and set over unto the State Bank of Blue Hill a policy of insurance for the sum of two thousand dollars, upon which loss had occurred to the full amount thereof; that at the time of transferring of said policy of insurance to said bank it held a chattel mortgage against the defendant, B. A. Schunk, upon personal property of the value of two thousand dollars, and that said bank also held promissory notes as collateral in the sum of three hundred dollars.

Affiant further says that the alleged indebtedness of this defendant to said bank did not and does not exceed the sum and amount of nineteen hundred and ninety dollars and interest from November fifth.

Affiant further says that the loss by fire above referred to is, as he verily believes, a complete loss.

Affiant further says relative to the amount of plaintiff's claim which is not yet due, amounting to $1,664 04 *dollars*, that the defendant has sold, conveyed, or otherwise disposed of his property with the fraudulent intent to cheat or defraud his creditors or to hinder or delay them in the collection of their debt.

The affiant further says that said defendant is about to make such sale, assignment, conveyance, or disposition of his property with such fraudulent intent.

Affiant further says that he has good reason to believe and does believe that the First National Bank of Blue Hill, Neb., one H. G. Koehler, State Bank of Blue Hill, Neb., C. L. Pope, the Northern Assurance Co. of London, the Niagara Insurance Co., the Farmers' & Merchants' Insurance Co. of Lincoln, and the German Insurance Co. of Freeport each and all of them have property of the defendant in their possession, to wit:

23 The said insurance companies have money belonging to said defendant by reason of the issuance of insurance policies upon the goods and merchandise of said defendant, which said property was insured and has been totally destroyed by fire; that the said State Bank of Blue Hill, Neb., and C. L. Pope, its cashier, have property, money, rights, and choses in action belonging to said defendant; that said State Bank of Blue Hill and C. L. Pope are indebted to said defendant.

Affiant further says that the First National bank of Blue Hill, Neb., and H. G. Koehler, its cashier, have monies, rights, property, and choses in action belonging to the defendant in this case; that each and all of the above-mentioned banks, persons, and insurance companies are indebted to the defendant in amounts unknown to this affiant.

Affiant further says that he asks for an order granting an attachment against the property of said defendant.

CHAS. F. CALKINS.

Subscribed in my presence and sworn to before me this fourteenth day of November, 1891.

[SEAL.] JOHN H. BEXTER,
Notary Public.

Upon the back of said affidavit for attachment appear endorsements in words and figures following, to wit: No. 396, O. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Affidavit for attachment and against garnishees & for claims before due. Filed Nov. 14, 1891. Elmer D. Frank, clerk. Capps & Stevens, for pl'ff.

Thereupon, afterwards, to wit, on the said 14th day of November, 1891, summons was duly issued in said case and returned and filed November 20th, 1891; which said summons is in words and figures following, to wit:

UNITED STATES OF AMERICA, } *ss:*
District of Nebraska, }

24 The President of the United States of America to the marshal of the district of Nebraska, Greeting:

You are hereby commanded to notify the defendant, B. A. Schunk, that he has been sued by Moline, Milburn & Stoddard Company in the circuit court of the United States for the district of Nebraska aforesaid, at Omaha, Nebraska; that unless he answer by the 14th day of December, A. D. 1891, the petition of the said plaintiff this day filed against him in the clerk's office of said court said petition will be taken as true and judgment rendered accordingly.

You will make due return of this summons on the 23rd day of Nov., A. D. 1891.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 14th day of November, A. D. 1891, and in the 116th year of the Independence of the United States of America.

[SEAL.]

Attest: ELMER D. FRANK, *Clerk.*

Attached to said summons is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 14 day of Nov., 1891, I received this summons and on the 17th day of Nov., 1891, I served the same on the within-named B. A. Schunk, in Webster county, State and district of Nebraska, by delivering to and leaving with her a certified copy thereof, with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska,
By C. W. LYON,
Deputy United States Marshal.

Upon the back of said summons appear endorsements in words and figures following, to wit: No. 396, O. United States circuit court, district of Nebraska. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Summons. Amount claimed of the defendant by the

plaintiff is $530.09 & int., at 10%, from Oct. 1, 1891, and for
25 the further sum of $1,664.04, which will become due and payable the 1st and 8th days of Dec., 1891, & costs of suit. Returned and filed Nov. 20, 1891. Elmer D. Frank, clerk. Capps & Stevens, att'y for pl'ff. Mar'l costs on attachment.

Thereupon, afterwards, to wit, on the 12th day of December, 1891, demurrer was filed in said cause; which said demurrer is in words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States for the District of Nebraska.

MOLINE, MILBURN & STODDARD CO.
vs.
B. A. SCHUNK.

Comes now the defendant and demurrers to the petition of the plaintiff herein filed for the following reasons:

First. Because the facts set forth in said petition do not state a cause of action in favor of the plaintiff and against the defendant.

Second. Because this court has no jurisdiction of the subject-matter in this suit.

Third. Because the amount in controversy herein is less than two thousand dollars.

LAMB, RICKETTS & WILSON,
Attorneys for Defendant.

Upon the back of said demurrer appear endorsements in words and figures following, to wit: No. 396, O. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Demurrer. Filed Dec. 12, 1891. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'ys for defendant.

Thereupon, afterwards, to wit, on the said 12th day of December, 1891, motion to discharge attachment was filed in said case;
25½ which said motion to discharge attachment is in words and figures following, to wit:

Motion to Discharge Attachment.

In the Circuit Court of the United States for the District of Nebraska.

MOLINE, MILBURN & STODDARD CO.
vs.
B. A. SCHUNK.

Comes now the defendant and moves the court to discharge the attachment heretofore issued and levied herein for the following reasons:

First. Because the affidavit and facts therein stated upon which said attachment was issued are not sufficient to sustain the same.

Second. Because the facts or alleged facts contained in the affidavit upon which the attachment was issued are untrue and false.

Third. Because the court had no jurisdiction to issue an attachment in this case.

LAMB, RICKETTS & WILSON.
Att'ys for Defendant.

Upon the back of said motion to discharge attachment appear endorsements in words and figures following, to wit: No. 396, O. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Motion to discharge attachment. Filed Dec. 12, 1891. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'ys for def'ts.

Thereupon, afterwards, to wit, at the January term of said court, on the 20th day of February, 1892, the following proceedings were had and done in said cause, as appears of record on folio 269, Journal "Q" of said court, to wit:

THE MOLINE, MILBURN & STODDARD CO., Plaintiff,
vs.
B. A. SCHUNK, Defendant. } 396, O.

This cause came on to be heard at the January, 1892, term of
26 said court, upon the 9th day of February of said term, upon the motion of the defendant to discharge the attachment issued herein and upon the affidavits and evidence for and against said motion and the arguments of counsel, and thereupon the court took the same under advisement; and now, on this twentieth day of February of said term, the court, being fully advised in the premises, finds against said defendant on her said motion, and further finds that at the commencement of this action the defendant had sold, conveyed, and otherwise disposed or attempted to dispose of her property with the fraudulent intent to cheat and defraud her creditors, and particularly to cheat and defraud the plaintiff and to hinder and delay her creditors and said plaintiff in the collection of their debts; that said fraudulent disposition of said defendant's property consisted of an assignment of three insurance policies, one for $2,000.00 in the Niagara Insurance Company, one for $2,000.00 in the Farmers' & Merchants' Insurance Company, and one for $1,000.00 in the German Insurance Company of Freeport, Illinois, made by the said defendant on the 10th day of November, 1891, to one H. G. Koehler; that said fraudulent disposition of said defendant's property further consisted of an assignment to the said H. G. Koehler, on the said 10th day of November, of book accounts of the defendant aggregating $2,400.00 and of the value of $1,400.00, and further consisted of an assignment of one insurance policy in the Northern Assurance Company of London, made by the said defendant on the 10th day of November, 1891, to the State Bank of Blue Hill and to C. L. Pope, the cashier of said bank, and further consisted in giving a chattel mortgage on his property, particularly a chattel mortage to H. G. Koehler, cashier of the First National Bank of Blue Hill.

And the court further finds that the several transfers of said policies and of said accounts to the said Koehler and said transfers by said chattel mortgage were fraudulent and void and were
27 made for the purpose of hindering and delaying the plaintiff in collecting its said debt.

The court further finds that the said assignment of said policy to the said State Bank of Blue Hill and to the said C. L. Pope, the cashier of said bank, was made for the purpose of securing the payment of a debt of a copartnership doing business under the firm name of Smith & Schunk, and was not made to secure the payment of a debt of the defendant, and that said assignment of said policy was fraudulent and void, and was made for the purpose of hindering and delaying the plaintiff in collecting its said debt.

The court further finds that at the time of the service of garnishment process in this action on the said Niagara Insurance Company there was then due and payable to the defendant from it, on account of the loss of the property covered by said insurance policy, the sum of $1,580.67; that at the time of the service of garnishment process in this action on the said Farmers' & Merchants' Insurance Company there was then due and payable to the defendant from it, on account of the loss of the property covered by said insurance policy, the sum of $1,580.67; that at the time of the service of garnishment process in this action on the said Northern Assurance Company of London there was then due and payable to the defendant from it, on account of the loss of the property covered by said insurance policy, the sum of $1,580.67.

Wherefore it is considered and adjudged by the court that the said motion of said defendant to discharge said attachment be, and the same is hereby, overruled and the said attachment is hereby sustained.

Thereupon, afterwards, to wit, at the May term of said court, on the 21st day of May, 1892, the following proceedings were had and done in said cause, as appears of record on folio 531, Journal "Q" of said court, to wit:

28 *Judgment.*

THE MOLINE, MILBURN & STODDARD COMPANY, Plaintiff,
vs.
B. A. SCHUNK, Defendant. } 396, O.

This cause came on to be heard upon the demurrer of the defendant to the petition of the plaintiff filed herein, and the court, being fully advised in the premises, finds that the grounds alleged in said demurrer are not well taken, and it is therefore considered by the court that said demurrer be, and the same is hereby, overruled, to the overruling of which the defendant excepts; and it appearing to the court that the defendant is in default of an answer herein and intends to rely upon her demurrer filed herein for her defense to said petition, and said cause coming on for a hearing upon the petition and the proofs, it is considered and adjudged by the court that the

plaintiff have and recover judgment against the said defendant for the sum of $2,347.50 and costs of suit, together with $100.00 as an attorney's fee, and that said judment draw interest at ten per cent. per annum until paid.

(S'g'd) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 9th day of June, 1892, petition for writ of error was filed in said case; which said petition for writ of error is in words and figures following, to wit:

In the Circuit Court of the United States, District of Nebraska.

THE MOLINE, MILBURN & STODDARD COMPANY, Plaintiff,
vs.
B. A. SCHUNK, Defendant.

Petition for Writ of Error.

Comes now B. A. Schunk, the defendant in the above-entitled cause, and petitions the honorable the circuit court for a writ of error in said cause to the Supreme Court of the United States and assigns each of the following errors in her behalf:

29

1. That the circuit court erred in said cause in assuming and entertaining jurisdiction in the said cause.
2. That the court erred in awarding a writ of attachment in said cause.
3. That the court erred in overruling each of the demurrers interposed by this defendant in the said cause.
4. That the court erred in sustaining the attachment in said cause and overruling this defendant's motion to dissolve the attachment in said cause.
5. That the court erred in rendering judgment in the said action against this defendant in the said cause when it ought to have been in favor of this defendant dissolving the said action.
6. That the court erred in awarding the plaintiff therein an attorney's fee in said action.

Wherefore the said B. A. Schunk prays for a writ of error to the Supreme Court of the United States in said cause and for a reversal of the judgment entered therein and for costs.

B. A. SCHUNK,
By WALTER J. LAMB,
HENRY H. WILSON, AND
ARNOTT C. RICKETTS,
Her Attorneys.

Upon the back of said petition for writ of error appear endorsements in words and figures following, to wit: No. 396, O. Moline, Milburn & Stoddard Co. *vs.* B. A. Schunk. Petition for writ of error. Filed Jun- 9, 1892. Elmer D. Frank, clerk. Lamb, Ricketts & Wilson, att'ys for defendant.

Thereupon, afterwards, to wit, on the 9th day of June, 1892, a writ of error was allowed in said case and a citation issued thereon, of which said writ of error and citation the following are the originals:

30 UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the District of Nebraska, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The Moline, Milburn & Stoddart Company, plaintiff, and B. A. Shunk, defendant, a manifest error hath happened, to the great damage of the said defendant in the said cause, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States shall be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, at Omaha, in said district, this 9th day of June, 1892.

E. D. FRANK, *Clerk.*

[Seal United States Circuit Court, District of Nebraska.]

Allowed by—
ELMER S. DUNDY, *Judge.*

30½ [Endorsed:] No. 396, O. United States circuit court, district of Nebraska. Moline, Milburn, & Stoddard Company *vs.* B. A. Schunk. Writ of error. Filed Jun- 9, 1892. Elmer D. Frank, clerk.

31 THE UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

To the Moline, Milburn and Stoddardt Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the 2nd Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Nebraska, wherein B. A. Shunk is plaintiff in error and

you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Omaha, this 9th day of June, 1892.

[Seal United States Circuit Court, District of Nebraska.]

ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 396, O. United States circuit court, district of Nebraska. Moline, Milburn & Stoddard Company *vs.* B. A. Schunk. Citation. Filed Jun- 9, 1892 Elmer D. Frank, clerk.

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 9th day of June, 1892, I received this citation, and on the 9th day of June, 1892, I served the same upon the within-named Warren Switzer, member of the firm of Switzer & McIntosh, attorneys of record for the within-named The Moline, Milburn and Stoddard Company, in Douglas county, State and District of Nebraska, by delivering to and leaving with him a certified copy thereof with all the endorsements thereon.

BRAD. D. SLAUGHTER,
United States Marshal for the District of Nebraska.
By C. W. LYON,
Deputy United States Marshal.

[Endorsed:] Filed Jun- 14, 1892. Elmer D. Frank, clerk.

Marshal's Costs.

Copy	30
Service	2 00
Mileage	06
Total	$2 36

32 And also on said 9th day of June, 1892, a bond was filed in said case; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, B. A. Schunk, Henry Koehler, C. L. Pope, and C. Koehler, are held and firmly bound unto the Moline, Milburn and Stoddard Company in the full and just sum of five thousand dollars, to be paid to the said The Moline, Milburn and Stoddard Company, its successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of May, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas lately, at the May term, A. D. 1892, of the circuit court of the United States for the district of Nebraska, in a suit depending in said court between The Moline, Milburn and Stoddard Company, plaintiff, and B. A. Schunk, defendant, judgment was rendered against the said B. A. Schunk for the sum of twenty-three hundred forty-seven & $\frac{10}{100}$ dollars and an attorney's fee of $100.00, besides costs, and the said B. A. Schunk has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit and a citation directed to the said Moline, Milburn and Stoddard Company, citing and admonishing them to be and appear in the Supreme Court of the United States on the second Monday of October, A. D. 1892:

Now, the condition of the above obligation is such that if the said B. A. Schunk shall prosecute said writ of error to effect and answer all damages and costs if she fail to make good her plea, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of —

B. A. SCHUNK. [SEAL.]
HENRY KOEHLER. [SEAL.]
C. L. POPE. [SEAL.]
C. KOEHLER.

Approved by—
ELMER S. DUNDY, *Judge.*

Upon the back of said bond appear endorsements in words and figures following, to wit:

33 STATE AND DISTRICT OF NEBRASKA, } ss:
Webster County, }

Henry Koehler, C. L. Pope, and C. Koehler, each for himself being first duly severally sworn, on oath says that he is a freeholder within the State of Nebraska, and he is worth more than the sum of five thousand ($5,000.00) dollars over and above all debts and liabilities in property that is not exempt by law from execution.

HENRY KOEHLER.
C. L. POPE.
C. KOEHLER.

Subscribed in my presence and sworn to before me this 4th day of June, 1892.

[SEAL.] A. M. WALTERS,
Notary Public.

[Endorsed:] No. 390. O. United States circuit court, district of Nebraska. Moline, Milburn and Stoddard Company *vs.* B. A. Schunk. Bond. Filed June 9, 1892. Elmer D. Frank, clerk.

34 UNITED STATES OF AMERICA, } ss:
District of Nebraska. }

In pursuance to the foregoing writ of error and in obedience thereto, I, Elmer D. Frank, clerk of the circuit court of the United States for said district of Nebraska, within the eighth circuit, do hereby certify that the foregoing folios, from one to thirty-four, contain true and faithful transcripts from the records and files of said court in the case of Moline, Milburn and Stoddard Company *vs.* B. A. Schunk, and that copies of writ of error and citation have been lodged and remain in my said office.

Seal United States Circuit Court, District of Nebraska.

Witness my hand and the seal of said court, at Omaha, Nebraska, this 1st day of July, A. D. 1892.

ELMER D. FRANK, *Clerk.*

Endorsed on cover: Case No. 15,123. Nebraska C. C. U. S. Term No., 1153. B. A. Shunk, plaintiff in error, *vs.* The Moline, Milburn & Stoddard Company. Filed September 2, 1892.

IN THE SUPREME COURT

OCTOBER TERM,

No. 13,

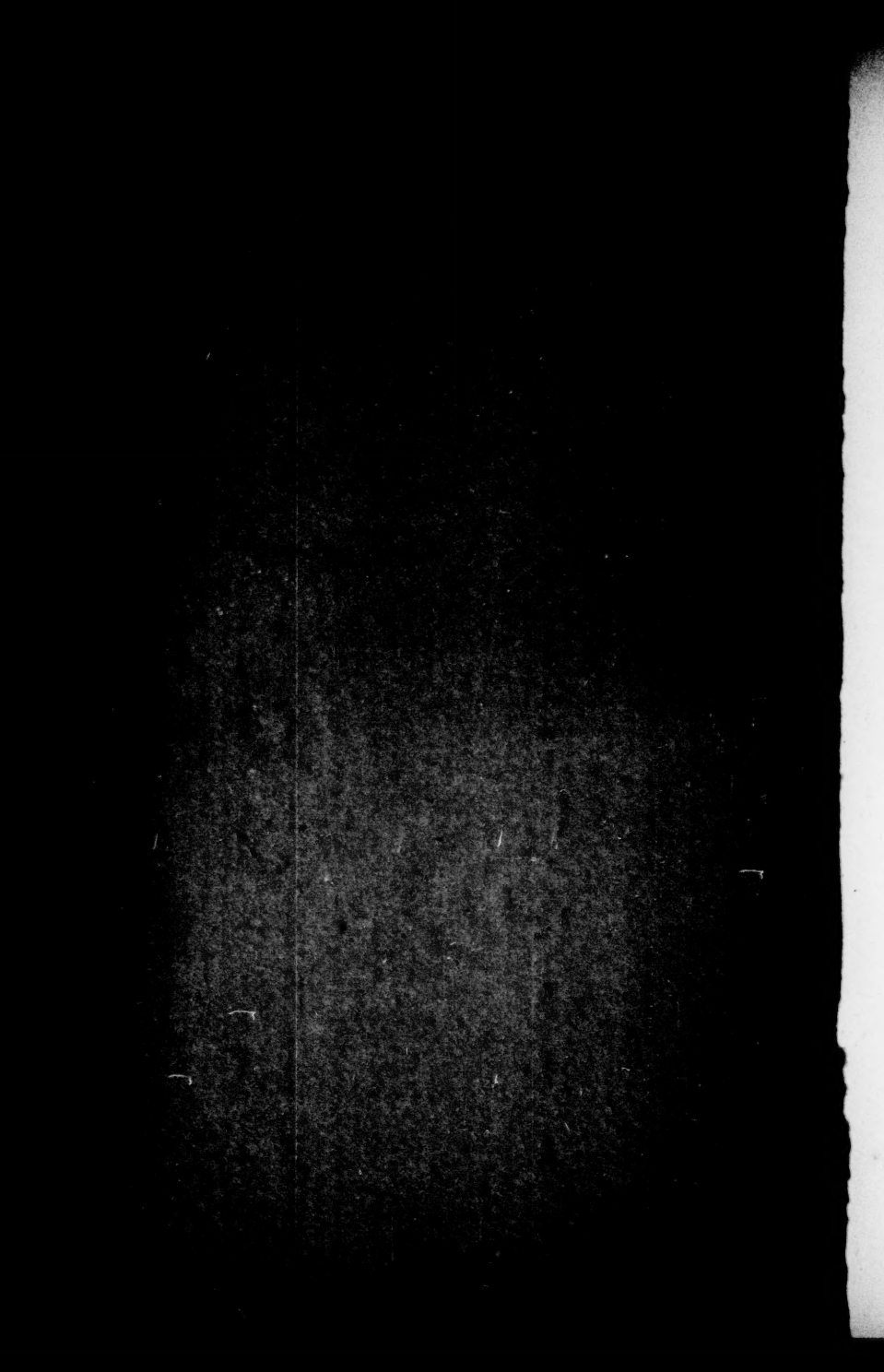
B. A. SCHUNK,
Plaintiff in Error,

vs.

THE MOLINE, MILBURN & STANDARD COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Attorneys for Defendant in Error.



IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM—1892.

No. 15,123.

B. A. SCHUNK,
Plaintiff in Error,

vs.

THE MOLINE, MILBURN & STODDARD COMPANY,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The Question of the Jurisdiction of the Circuit Court is the Only Question That Can Be Considered in This Proceeding.

Sec. 5 of the Act of March 3rd, 1891, establishing Circuit Courts of Appeals, etc., provides, "That appeals or writs of error "may be taken from the District Courts or from the existing Cir- "cuit Courts direct to the Supreme Court in the following cases: "First—In any case in which the jurisdiction of the Court is in "issue; in such cases the question of the jurisdiction of the Court "alone shall be certified to the Supreme Court from the Court be- "low for decision." If the plaintiff in error desired to have the other assignments of error presented by him considered, his proper remedy was to have taken this case to the Circuit Court of Appeals, where all his assignments of error might have been considered, and that Court, in a proper case, could have certified the question of jurisdiction to this Court for its determination. By coming into

this Court, however, the plaintiff in error elects, by so doing, to have considered the single question of the jurisdiction of the Court.

McLeash vs. Croff, 141 U. S., 661.

Horner vs. United States, 143 U. S., 570.

Barling vs. Bank of British North America, 1 C. C. A., 510.

This, therefore, disposes particularly of the assignment of error relating to the judgment for attorney's fees in this case, and of all that part of the plaintiff in error's brief devoted to that subject.

The Circuit Court Had Jurisdiction Over the Matters in Controversy in This Suit.

The act of Congress of 1887 to determine the jurisdiction of Circuit Courts of the United States where there is a controversy between citizens of different states, is the same as the Act of 1875, except that where there is a controversy between citizens of different states, the Act of 1887 requires that the matter in dispute shall exceed, exclusive of interest and costs, the sum or value of $2,000.00; while the Act of 1875 provided that the matter in dispute should exceed, exclusive of costs, the sum or value of $500.00. The question of jurisdiction, therefore, in controversy between citizens of different states is the same under the Act of 1887 as under the Act of 1875, except as to the sum or value of the matter in dispute. Nowhere is it required as a condition of jurisdiction that the amount in dispute shall be due before action can be brought. Ordinarily, if it were determined that the plaintiff's cause of action was prematurely brought because the debt or demand referred to in it was not yet due, the judgment of the Court would be a judgment of dimissal for that reason, and not because the subject matter of the plaintiff's demand did not involve a controversy equal to the claim set forth in his petition.

THE MEANING OF THE WORD DISPUTE, AS USED IN THE ACT ABOVE REFERRED TO, IS AN IMPORTANT INQUIRY HERE. In the Act itself the word dispute seems to be identical with the word controversy, and could be substituted in the language of said Act for the word contro-

versy without changing the meaning of the Act. In fact, the Courts have held that the word dispute in this Act was identical with the word controversy as used in the Constitution of the United States.

CIRCUIT JUDGE MCCREARY in *Leith vs. Levi, 2 F. R., 743*, referring to the word dispute contained in the foregoing Act in connection with the provision for the removal of causes, said: "The term dispute as employed in the statute must be held to be "exactly synonymous with the word controversy in the above "mentioned clause of the Constitution." In *Lee vs. Watson, 1 Wal., 337*, the question was whether or not the amount in controversy was sufficient to authorize a re-examination in the Supreme Court of final judgment of the Circuit Court. MR. JUSTICE FIELD, in delivering the opinion of this Court there, said: "To "authorize a re-examination of a final judgment of the Circuit "Court, the matter in dispute must, with some exceptions, exceed "the sum or value of $2,000. By matter in dispute is meant the "subject of litigation, the matter for which the suit is brought, and "upon which issue is joined, in relation to which jurors are called "and witnesses examined."

In *Gaines vs. Fuents et al, 92 U. S., 10*, this Court said: "A "controversy was involved, in the sense of the statute, whenever "any propeety or claim of the parties capable of pecuniary estima- "tion was the subject of litigation and was presented by the plead- "ings for judicial determination."

There can be no question, therefore, that the petition filed by the plaintiff in the Circuit Court in this action raised a controversy between the plaintiff and the defendant.

DID THE MATTER IN DISPUTE EXCEED EXCLUSIVE OF INTEREST AND COSTS THE SUM OR VALUE OF $2,000.00?

The plaintiff in error argues that because a part of the plaintiff's claim was not due at the time this action was commenced, and because the amount then due, exclusive of interest and costs, did not exceed the sum or value of $2,000.00 that therefore the Court had no jurisdiction.

This contention entirely loses sight of the fact that it is not the amount which the plaintiff may recover but the amount which the plaintiff claims, that confers jurisdiction. The plaintiff in its petition claimed more than $2,000.00 exclusive of interests and costs; asserting that claim in good faith conferred jurisdiction.

In *Kanouse vs. Martin*, *15 How.*, *197*, the plaintiff, in his original petition, claimed damages against the defendant in the sum of $1,000. After the defendant had filed a petition and bond to remove the cause to the Federal Court, the plaintiff amended his petition, reducing his claim to the sum of $500. This was held error by the Court, MR. JUSTICE FIELD using the following language: "The declaration then on file demanded damages in the "sum of $1,000; that was the matter then in dispute between the "parties. The words 'matter of dispute' in the 12th Sec. of the "Judiciary Act do not refer to the disputes in the country or the in- "tentions or expectations of the parties concerning them, but to "the claim presented on the record for the legal consideration of "the Court. What the plaintiff thus claims is the matter in dis- "pute, though that claim may be incapable of proof, or only in "part well founded. So it was held under this section of the "statute, and in reference to the right of removal in *Gordon vs.* "*Longest*, *16 Peters 97*; and the same construction has been put "upon the eleventh and twenty-second sections of the Judiciary "Act, which makes the jurisdiction of this Court and the Circuit "Court depend upon the amount or value of the matter in dispute."

In *Gordon vs. Longest*, *16 Pet.*, *97*, the Court said: "In the "declaration the plaintiff laid his damages at the sum of $1,000, "and this was the amount named in the writ. * * * * "The damages claimed in the writ were unquestionably the sum in "controversy. This is not an open question. It has been often "decided that if the plaintiff shall recover less than $500, it may "not affect the jurisdiction of the Court; a greater sum being "claimed in his writ. But in such case the plaintiff does not re- "cover his costs, and, at the discretion of the Court, he may be "adjudged to pay costs. The damages claimed by the plaintiff in his

"writ gives jurisdiction to the Court whether it be an original suit "in the Circuit Court of the United States, or brought here by "petition from a State Court."

In *Hardin vs. Cass County, 42 F. R., 652*, the plaintiff brought his action upon three counts, two of which were barred by the statute of limitations, as the petition on its face showed, and the amount in controversy in the third was less than the sum necessary to give the Federal Court jurisdiction. The defendant insisted that since the matter in dispute involved in the count not barred by the statute was the only real cause of action left to the plaintiff and the amount in dispute therein was below the jurisdiction of the Court, that therefore the plaintiff ought not to recover on this count and the action should be dismissed. The Court denied this claim and said, "Prima facie the amount claimed in the petition is the amount in "dispute, and this determines the jurisdiction in the first instance. "This governs the question of jurisdiction until it is made to appear "that the real demand is less * * * *

"After a successful defense to one or more causes of action "counted on in the petition, the jurisdiction of the Court is not "ousted to prevent it from proceeding to judgment for the amount "found on trial to be due and owing to the plaintiff, forsooth it "may be less than $2,000."

In its petition in this action the plaintiff set forth fifteen separate causes of action, and prayed for judgment for the sum of $2,194.13 (*Record, page 8*). The summons that was served on the defendant was endorsed as follows: "Amount claimed of the defendant by the "plaintiff is $530.09, and interest at ten per cent. from October 1, "1891; and for the further sum of $1,664.04, which will become "due and payable the 1st and 8th days of December, 1891." (*Record, page 16*). The judgment of the Court was in favor of the plaintiff for the sum of $2,347.50 and costs, together with $100 as an attorney's fee (*Record, page 20*).

THE DISPUTE IN THIS ACTION WAS TWOFOLD.

It was an action, first, to take into the custody of the Court, under a writ of attachment, enough of defendant's property to pay

the amount of the plaintiff's debt, both that part of it that was past due and that part of it that was not due at the time of filing the petition, in a sum alleged to exceed the sum of $2,000, to the end that the defendant might not succeed in his fraudulent purpose and undertaking of disposing of his property, as he was then doing, for the purpose of cheating and defrauding the plaintiff; and second, to obtain judgment against the defendant for the amount of plaintiff's claim after it should become due, and to obtain satisfaction of such judgment out of the property so taken into the custody of the Court.

Such a proceeding could have been instituted by proceedings in an attachment in the state courts of Nebraska, and the Federal Statutes confer on the Federal Courts in actions at common law, similar remedies by attachment or other process that are now provided by the laws of the state in which such Court is held. This power is conferred by *Section 915 of the Revised Statutes of the United States*, which is as follows: "In common law cases in the "Circuit Court and District Courts, the plaintiff shall be entitled to "similar remedies by attachment or other process against the prop- "erty of the defendant which are now provided by the laws of the "state in which such Court is held; for the Courts thereof; and such "Circuit Court or District Courts may from time to time by general "rules adopt such State laws as may be in force in the States "where they are held in relation to attachment and other process, "provided that similar preliminary affidavits or proofs and similar "security as required by such State laws shall be first furnished by "the party seeking such attachment or other remedy."

In his brief the plaintiff in error has quoted correctly the statute of Nebraska under which the proceedings of this action were instituted. No claim is made that the laws of Nebraska do not warrant and authorize the proceedings that were had herein if they had been conducted in the State Courts, but the plaintiff in error seeks to exclude the remedy here given by the State statute from the remedies available in the Federal Courts, under Sec. 915 above

quoted, by urging that this action is not a common law case. The statutes of the Federal Court, conferring jurisdiction on it, do not, when they refer to common law actions, mean only such actions as were maintainable under the letter of the old common law, but in these statutes the phrase "suits at common law," or "common law cases" is used to distinguish them from suits of equity or admiralty causes. Every form of action which is not either a suit in equity or in admiralty jurisdiction is, in the sense in which the phrase "common law causes" is used in these statutes, a common law case.

Parsons vs. Bedford, 3 Pet., 432.

Kohl et al vs. United States, 91 U. S., 367.

Gaines vs. Fuentes et al, 92 U. S., 10.

No one will contend that if the plaintiff's entire demand had been past due when this action was commenced either that the Court had not jurisdiction because the amount in controversy was not large enough, or that the Court had not authority under the provisions of said section 915 to cause a writ of attachment to issue, if in like cases an attachment might have issued out of the State Court. If that is true for a debt that is past due, why not for a debt that is not yet past due, if a remedy in such case is given by the State Statute? Section 915 does not say that the Circuit Court shall be entitled to similar remedies by attachment which are now provided by the laws of the State, provided the subject matter of the plaintiff's cause of action is past due, but the remedy by attachment authorized by the act is as broad as the remedy prescribed by the State Statutes, and whatever that remedy is the Federal Courts have under this section authority to adopt it.

The plaintiff in error, however, contends that the right to maintain an action by suit in attachment before the debt is due is purely a statutory right. So is the right to maintain any attachment in Nebraska. No attachment can be maintained in this State unless the party seeking the right of attachment makes and files an affidavit swearing to certain specific facts prescribed by the statute; and if

he fails to do this, or if, having undertaken to do so he fails fully to cover the ground prescribed by the statues, his attachment will not hold.

THE FEDERAL COURTS HAVE BEEN LIBERAL IN CONSTRUING SAID SECTION 915 OF THE FEDERAL STATUTES. Under this section the Federal Courts have not merely adopted the letter of the statutes of the States regulating attachments, but have also administered all the remedies that were incident to such a proceeding. *Krippendorf vs. Hyde, 110 U. S., 276*, is an interesting illustration of this. In that case the attachment had issued in favor of Hyde Brothers against Fry et al. in the Federal Court, and a levy had been made that was illegal. Krippendorf, a citizen of the State in which the action was brought, brought an attachment suit in the State Court, but the Sheriff was not able to make a levy, because he found the goods of the defendant in the custody of the United States Marshal. In that suit, Krippendorf was permitted to come into the suit in the Federal Court and file and prove his claim against the defendant in pursuance of a statute of the State of Indiana, where the suit was brought, giving that right. Proceedings that were approved by the Court in that case are more clearly stated in the opinion of the Court, as follows: "In the "original action of *Hyde Bros. vs. Frey & Magg* in which "the attachment was issued and levied, jurisdiction of the "Circuit Court attached by reason of the citizenship of the parties, "but the statute of Indiana granting and regulating proceedings in "attachment, provides, paragraph 943 Revised Statutes of 1881, "that after the institution of the suit and at any time before final "judgment any creditor of the defendant may file and prove his "claim with a right to participate in the distribution of the pro-"ceeds of the attached property. In the present case that actually "took place, and it is shown, on the face of the bill, that a large "number of persons as to whom it is not stated that they were citi-"zens of other States competent to bring an original action in the "Circuit Court, and as to whom it does not affirmatively ap-"pear that the judgments upon their claims in their favor are less

"than the jurisdiction of the sum of five hundred dollars, "notwithstanding, filed their claims, obtained judgments, and will "be entitled on distribution to divide with the plaintiff and among "themselves the money paid into Court by the appellant."

The foregoing decision is interesting as illustrative of the meaning of Sections 914, 915 and 916 of the Statutes of the United States.

Krippendorf vs. Hyde, supra, was quoted by this Court as authority for the decision reached in the case of *Gumbel vs. Pitkin, 124 U. S., 132*, in which this Court reached the conclusion announced in the third paragraph of the syllabus of that case, which is as follows: "The exercise of the jurisdiction conferred upon Circuit Courts "of the United States by *Revised Statutes, paragraph 915*, to ad- "minister the attachment laws of the State in which the Court is "held, *necessarily draws to itself everything particularly incidental,* "*even though it may bring into the Court, for the adjudication of* "*their rights, parties not otherwise subject to its jurisdiction;* and "is ample to sanction the practice of permitting a constructive levy, "by attaching creditors under State process, upon property in pos- "session of a United States marshal by virtue of an attachment "made under a process from a Circuit Court of the United States "for the same district, and every intervention in proceedings of the "latter Court, where as between State Courts of concurrent juris- "diction, a similar method of acquiring and adjusting conflicting "rights is prescribed."

It is a fact worthy of note that in all the decisions of the Federal Courts, whether of the Circuit or of the Supreme Court, there is not one decision, there is not one word of dictum showing, or tending to show, that the Court, in cases similar to this, has not jurisdiction to grant an order of attachment and to render a judgment after the debt becomes due. And if it could possibly be the law that the Court could not have jurisdiction in such case, certainly in all these years that question must have been raised and the law so announced.

JOHN L. WEBSTER,
WARREN SWITZLER,
JAMES MCINTOSH,
Attorneys for Defendant in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1892.

No. 15,123.

B. A. SCHUNK,
Plaintiff in Error,
vs.
THE MOLINE, MILBURN & STODDARD COMPANY,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On the 14th day of November, 1891, the defendant in error filed its petition in the circuit court for the district of Nebraska, the object and prayer of which was to seize and sequester property of the plaintiff in error to answer for the payment of a debt which was alleged would mature thereafter. Some of the notes set forth in the plaintiff's petition were already due, but such past due notes did not aggregate enough to give the court jurisdiction, and the larger part of the claim had not yet matured, and the plaintiff in error was not in default in its payment. To this petition the plaintiff in error filed in the circuit court a demurrer on the ground that the court had no jurisdiction over the alleged cause of action, and that the petition did not state facts suf-

ficient to constitute a cause of action. The circuit court overruled the demurrer and the plaintiff in error electing to stand upon the same, judgment was entered on the 21st day of May, 1892, for the sum of $2,347.50 and costs of suit, and $100 attorney's fees.

ASSIGNMENT OF ERRORS.

First—The court erred in overruling the demurrer.

Second—The court erred in holding that it had jurisdiction to seize and sequester property to secure the payment of a debt not yet due.

Third—The court erred in holding that it had jurisdiction to issue an attachment upon a demand not yet due.

Fourth—The court erred in allowing the plaintiff an attorney's fee of $100.

ARGUMENT.

The point raised in this case involves the question of the extent to which a Federal court has jurisdiction to apply the remedy of attachment to secure a debt that has not become due. It is a fundamental doctrine of the Federal courts that no jurisdiction can be conferred upon them by state legislation. The national courts derive their powers and jurisdiction wholly from the Constitution of the United States and the enactments of the Federal congress. The circuit court of the United States for the district of Nebraska being a court of limited and special, though not inferior, jurisdiction, every presumption is against its power to act, and unless facts appear upon the record which, by virtue of some Federal law, confer jurisdiction upon it, then its

jurisdiction will fail. A state statute can never confer, enlarge, or restrict the jurisdiction of the Federal court.

Smith vs. R. R. Co., 9 Otto, 398.
Ex parte McNiel, 13 Wall., 236, 243.

It must therefore be conceded that unless something is found in the Federal statutes empowering the circuit courts to take jurisdiction of an original attachment proceeding for the purpose of holding the property to answer for a debt to become due in the future, such courts are bound to decline to take jurisdiction of such proceedings. Had this action been commenced in the state courts of Nebraska the following sections of the code of civil procedure of that state would have been applicable, and would no doubt have conferred jurisdiction upon such state court:

"SEC. 237. A creditor may bring an action on a claim before it is due and have an attachment against the property of the debtor in the following cases: *First*—Where a debtor has sold, conveyed, or otherwise disposed of his property, with the fraudulent intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts. *Second*—Where he is about to make such sale, conveyance, or disposition of his property, or a material part thereof, with the intent or to the effect of cheating or defrauding his creditors, or of hindering and delaying them in the collection of their debts.

"SEC. 238. The attachment authorized by the last section may be granted by the court in which the action is brought, or by a judge thereof, or by the probate judge of the county; but before such action shall be brought, or such attachment shall be granted, the plaintiff, his agent, or

attorney shall make an oath, in writing, showing the nature and amount of the plaintiff's claim, that it is just, when the same shall become due, and the existence of some one of the grounds for attachment enumerated in the preceding section.

"SEC. 239. If the court or judges refuse to grant an order of attachment the action shall be dismissed, but without prejudice to a future action; and in all such actions application for an attachment must be made.

"SEC. 240. The order of the court or judge granting the attachment shall specify the amount for which it is allowed, not exceeding a sum sufficient to satisfy the plaintiff's claim and the probable costs of the action.

"SEC. 241. The order of attachment, as granted by the court or judge, shall not be issued by the clerk until there has been executed in his office such undertaking on the part of the plaintiff as is directed by section two hundred.

"SEC. 242. The plaintiff in such action shall not have judgment on his claim before it becomes due, and the proceedings on attachment may be conducted without delay.

"SEC. 243. The proceedings in the first article of this chapter subsequent to section two hundred shall, so far as they are applicable, regulate the attachments authorized by this chapter."

Cobbey's Consolidated Statutes of Nebraska, 1891, p. 1003.

It will, however, not be contended that the Nebraska code of procedure confers any power upon the circuit courts

of the United States except in so far as such statutes have been adopted by the Federal congress. The only Federal statute now in force authorizing Federal courts to administer the attachment laws of the several states in which they sit is Sec. 915 of the revised statutes, adopted June 1, 1872.

Did the act of 1872 confer upon the circuit court jurisdiction over a proceeding like that here involved? That act provides that "in common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit or district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held, in relation to attachments and other process, provided that similar preliminary affidavits or proofs and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

It will be observed that the above section provides that the circuit court may administer the remedy of attachments or other processes which are provided by the state laws, but such attachment or other process can be administered only in common law causes "in the circuit and district courts;" that is to say, an action must be regularly and lawfully brought in those courts, and the court must be able to acquire jurisdiction over both the person and the subject matter in order that it may administer the ancillary remedy of attachment. We concede that upon a claim already due, and in which the amount in controversy exceeds $2,000, and the citizenship of the parties is such as to confer jurisdiction in that respect, the circuit court may, in such a case

regularly brought in that court, by adopting the provisions of the state statutes, enforce the creditor's right of sequestering the property of the defendant for the purpose of answering any judgment that may be finally recovered.

Such an attachment proceeding is merely ancillary to the principal case, and if the attachment should fail the court still has jurisdiction to proceed to the trial of the cause and the entry of judgment. The state statutes in such cases confer neither jurisdiction over the subject matter nor over the person, but enables the circuit court, having jurisdiction over both of these, to administer the ancillary remedies provided by the state statutes in such cases. It cannot be contended that this provision of the law of 1872 confers or attempts to confer any new or additional jurisdiction in the circuit court either over the person or over the subject matter. How would this cause stand in the Federal court if no attachment had been issued? Clearly the plaintiff would have had no standing in the circuit court on a claim not yet due, when a suit was commenced, except by virtue of the state statute.

If the circuit court had dissolved the attachment it is clear that it would have had no jurisdiction to proceed to hear and determine a principal cause of action alleged in the petition because such action was prematurely brought and could not have been maintained. It certainly will not be contended that a creditor could commence a suit in the circuit court upon a claim not yet due and proceed to judgment over the objection of the debtor even after the maturity of such claim. It therefore follows that the circuit court in assuming jurisdiction to enter the judgment in this case on a claim that was not yet due when this suit was commenced, based that jurisdiction upon the state statute and not upon any Federal enactment.

JURISDICTION ORIGINAL, NOT ANCILLARY.

The whole nature of an attachment upon a claim not yet due is different from that of an attachment on a claim already due. In the former case the attachment is an original process issued by virtue of an original jurisdiction given by express statute. In the latter case, where the claim is already due, the attachment is merely an ancillary process and is administered by virtue of the court's jurisdiction over the principal cause of action.

Where the court has rightfully obtained jurisdiction over a cause of action on a claim already due, that jurisdiction is in no way affected by the success or failure of the attachment proceeding. That proceeding is merely ancillary to the principal case, and the court still exercises its jurisdiction over the principal case regardless of the fate of the attachment proceeding. It was clearly this ancillary proceeding, in no way affecting the original jurisdiction of the court, that must have been contemplated by the act of 1872. It is, however, entirely diffferent when an attachment is issued upon a demand before due. Here the court has no jurisdiction to hear and detertermine the principal case except by virtue of the jurisdiction obtained by the seizure of the property. Here the original and substantial jurisdiction is the power to attach and sequester the defendant's property and to hold it to answer the plaintiff's demand when the same shall become due. In this proceeding, the right to maintain the action at all rests wholly upon the success of the attachment proceeding. No suit can be maintained in any court upon such a demand under the Nebraska statute except by virtue of the seizure of the property.

Green vs. Raymond, 9 Neb., 297.

In event the attachment proceedings are wrongfully brought and on motion the attachment is dissolved, the court loses jurisdiction over the whole matter and cannot enter judgment on the claim after it becomes due if it was not due at the commencement of the suit. In other words, in this class of attachments the jurisdiction over the claim, not yet due, is incidental and ancillary to the original and independent jurisdiction to issue the attachment, seize and sequester the property.

Pierce vs. Myers, 28 Kan., 364.
Cownas vs. Hansen, 55 Wis., 341.
Terry vs. Curd, 6 South. Rep., 229.

Mr. Wade, in his work on attachments, Vol. 1, has pointed out very plainly the distinction we here make and says, "It is plain that when the process may be issued to attach property of the defendant at the suit of a creditor before his demand is due, it must be a case of *original*, as distinguished from ancillary, attachment. The action could not be commenced to reduce the demand to a general judgment until there was a present obligation to pay."

Wade on Attachments, Sec. 161.

If the plaintiff below had filed its petition in exactly the same form and language that it now is, and had filed no affidavit or bond, and had not procured the issue of an attachment, it cannot be questioned that the circuit court would have declined to entertain jurisdiction of its suit; not because of a want of jurisdiction over the persons, because the proper allegations in that respect are found in the petition, but because the Federal statutes nowhere empower the circuit court to take jurisdiction of a case in

which the claim is not yet due. How can it be said that the amount in controversy at the commencement of this suit exceeded the sum of $2,000, when as to the greater portion of it the plaintiff below had no right to demand payment, and certainly had no right to assume that the defendant would refuse payment when it became due.

It cannot be said that there is a controversy between the parties before the one has a right to demand or the other is under obligation to pay the claim sued upon. Had this case been commenced in the state court that court would have had jurisdiction because the state law gives that court jurisdiction to seize and sequester the property of a defendant in certain cases and hold the same to answer the demand of his creditor, which demand is not yet due; but this is a jurisdiction conferred upon the state courts by the state law, and we contend that the Federal court can derive no power or jurisdiction from that law, nor is any such jurisdiction, original and not ancillary in its character, conferred upon the circuit courts by the general language of the act of 1872. Congress certainly did not intend by that act to confer upon the Federal courts the same original jurisdiction as the state law conferred upon the state courts, but did intend to authorize the Federal courts to administer the ancillary remedies of attachment in cases otherwise properly cognizable in the national courts. The same civil code of Nebraska provides a method for obtaining jurisdiction by attachment over the property of a non-resident of the state by service of summons by publication, and this is one of the remedies "which are now provided by the laws of the state in which such court is held for the courts thereof," in the language of the act of 1872, but clearly that act was not intended to confer any new or original jurisdiction upon the circuit court, and it has been held that it did not in-

corporate into the Federal statute any of the provisions of the state statute concerning the method of obtaining the jurisdiction.

Ex parte Railway Co., 103 U. S., 794.
Harlan vs. U. L. T. Co., 40 Fed., 308.
Nazro vs. Craigan, 3 Dill., 474.

There is certainly no greater reason for holding that the act of 1872 incorporated into the Federal law the provision of the state statute for obtaining jurisdiction over the subject matter than there was for holding that it carried into the Federal law provisions for obtaining jurisdiction over the person or his property by publication.

We contend that the remedy by attachment and other process that may be administered by the circuit courts by force of state statutes as provided by the act of 1872, is limited and restricted to those ancillary proceedings, not original in their nature, which may be administered in the progress of the case over which the circuit court has already rightfully obtained jurisdiction by force of the Federal statutes. We can see no substantial distinction between assuming jurisdiction over the property of a non-resident by virtue of the act of 1872, because that remedy is provided by the state statute, and assuming jurisdiction over the subject matter of the seizure and sequestration of property to satisfy a claim not yet due, because such jurisdiction is granted to the state courts by state legislation.

We believe it to be a fundamental principle of the Federal judicial system that jurisdiction over the subject matter as well as over the person of the parties can be conferred only by the direct and explicit language of a Federal

statute. The power to seize and sequester property to answer a debt not yet due is an extraordinary and unusual jurisdiction of comparatively recent growth, and it will not be presumed from the very general and somewhat vague language of the act of 1872 that this extraordinary and unusual jurisdiction was intended to be conferred upon the Federal courts.

THIS NOT A COMMON LAW CAUSE.

It will be noticed that the act of 1872 restricts the remedies by attachment provided by state statutes to "common law causes." It will be observed that section 237 of the Nebraska code above quoted does not so restrict the remedy of attachment to "common law causes," nor yet to actions wherein legal relief alone is sought. The statute says "A creditor may bring an action on a claim before it is due." This plainly would authorize such an attachment in the state court in any civil action whether at common law, in equity, or founded upon statute. The code of Nebraska thus defines a civil action:

"SEC. 2. The distinction between actions at law and suits in equity, and the form of all such actions and suits heretofore existing are abolished, and in their place there shall be hereafter but one form of action, which shall be called a civil action."

Clearly this definition includes every case, not criminal in its nature, that can be prosecuted in the state courts of Nebraska. When section 237 above quoted provides that "a creditor may bring an action on a claim before it is due," it is manifest that the "action" referred to is the civil action as defined by section two of the same code. Hence an

action in equity or under a statute as well as common law actions are included. The Federal statute of 1872 restricts the remedy of attachment to "common law causes," and hence cannot be held to carry into the Federal jurisprudence the whole state law of attachments. Again the new and unusual action provided by section 237 is a purely statutory proceeding and can in no sense be called a "common law cause." At common law an action upon a claim before due was entirely unknown. No suit at common law could be maintained except upon a present obligation to pay.

This action being, then, a purely statutory proceeding, not primarily to liquidate a demand about which a controversy has arisen, but to seize and hold defendant's property to answer a claim to mature in the future, about which no controversy has or could have yet arisen, it does not fall in the class of "common law causes" mentioned in the act of 1872. Strictly speaking, it is not an action on the debt at all but a statutory proceeding to seize and hold property till a cause of action arises. This being the nature of this proceeding the circuit court acquired no jurisdiction over it.

We contend that the circuit court had no jurisdiction over this cause of action except by virtue of the seizure of defendant's property, and that it had no power to order the seizure of such property in a case where it had no jurisdiction of the subject matter without such seizure. The jurisdiction must exist in order to give the power to make the seizure, and such jurisdiction cannot be founded upon the seizure. The state, and not Federal legislature, has conferred the jurisdiction to issue an original attachment, and the state legislature has power to confer it upon the state but not upon the National tribunals.

ALLOWANCE OF ATTORNEY'S FEES.

A part of the judgment in this case was the allowance of an attorney's fee to the plaintiff of one hundred dollars. Prior to 1873 such attorney's fees were not allowed to the plaintiff under the Nebraska law in any action arising upon contract.

In re Breckenridge, 31 Neb., 492.

In 1883 the legislature passed "an act to provide for the allowance and recovery of attorney's fees in certain actions." Under that law it was the practice in the state courts of Nebraska to allow as a part of the costs an attorney's fee.

Bond vs. Dolby, 17 Neb., 493.

That statute was expressly repealed, the repeal taking effect June 1st, 1879, since which time no attorney's fees have been allowed in the state courts of Nebraska.

Dow vs. Updike, 11 Neb., 95.
Hardy vs. Miller, 11 Neb., 395.
Otoe County vs. Brown, 16 Neb., 395.
Bond vs. Dolby, 17 Neb., 493.
Hand vs. Phillips, 18 Neb., 593.
Winkler vs. Roeder, 23 Neb., 706.
In re Breckenridge, 31 Neb., 492.

In the latter case the supreme court, reviewing the history of this legislation, says, "It is the settled law of this state, therefore, that the plaintiff is not entitled to recover attorney's fees from the defendant in an action upon a promissory note or to foreclose a mortgage, notwithstanding such note or mortgage may provide for the allowance of a reasonable at-

torney's fees in case an action is brought on such instrument." The case at bar is a strictly law action and in such actions this court will follow the decisions of the highest court of the state in which the action rose and was tried.

Bendey vs. Townsend, 109 U. S., 665.
Dodge vs. Tulleys, 144 U. S., 451.

In the case last above cited this court had the matter of solicitor's fees under consideration, and in discussing the same, after reviewing the decisions of the supreme court of Nebraska, said, "In the cases cited, the supreme court of the state held that by the repeal of the statute the contract right to recover attorney's fees was taken away. So, as this court follows the decisions of the highest court in the state in such matters, the provision in the trust deed for the payment of one thousand dollars as attorney's fees cannot be regarded as of binding force." While in that case this court allowed a reasonable solicitor's fee as a part of the legitimate expenses of the trustee in carrying out his trust, the case may be regarded as settling the law that in a law case, prosecuted in the Federal courts sitting in the state of Nebraska, no attorney's fee can be recovered, notwithstanding the notes sued on provide for the same. Certainly if this court follows the decisions of the state of Nebraska on this question the judgment to the extent of the attorney's fees must be reversed.

For the foregoing errors we think the judgment *should be reversed* and the action dismissed.

WALTER J. LAMB,
ARNOTT C. RICKETTS,
HENRY H. WILSON,
Attorneys for Plaintiff in Error.